FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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October 19, 2001

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 2000-63-M
Petitioner	:	A.C. No. 04-01299-05536
v.	:	
	:	Docket No. WEST 2000-78-M
ORIGINAL SIXTEEN TO ONE MINE	:	A.C. No. 04-01299-05537
INCORPORATED,	:	
	:	Docket No. WEST 2000-195-M
Respondent	:	A.C. No. 04-01299-05538
	:	
	:	Original Sixteen to One

DECISION

Appearances: Christopher B. Wilkinson, Esq., Office of the Solicitor, U.S. Department of Labor, San Francisco, California, on behalf of Petitioner;
Michael M. Miller, President and Chief Operating Officer, Original Sixteen to One Mine, Inc., Alleghany, California, on behalf of Respondent.

Before: Judge Zielinski

These cases are before me on Petitions for Assessment of Civil Penalty filed by the Secretary of Labor against Original Sixteen to One Mine, Inc., pursuant to section 105 of the Federal Mine Safety and Health Act of 1977 (the "Act"). 30 U.S.C. § 815. The petitions allege a total of 26 violations of mandatory safety and health standards, as well as other regulatory provisions and the Act itself. A hearing was held in Downieville, California on January 17 and 18, 2001 and was continued and concluded on April 3, 2001, in Nevada City, California. Following receipt of the transcript, the parties submitted briefs. The Secretary filed a motion to strike portions of Respondent's brief, to which an opposition was filed on September 24, 2001. That motion is denied. At the commencement of the hearing, the parties advised that the Secretary had elected to vacate eight of the citations and that Respondent had withdrawn its contest of seven citations. During the hearing, Respondent withdrew its contest as to one additional citation. Consequently, ten citations were litigated, for which the Secretary proposes total civil penalties of $3,797.00.

For the reasons set forth below, I vacate one citation, affirm nine citations and impose

civil penalties totaling $1,030.00.

Background

The Original Sixteen to One Mine has been in operation for over 100 years and is one of the oldest and most unique underground mining operations in the country. The mining operation generally follows veins of ore, which in the Alleghany district have a moderate dip of 30 to 35 degrees. The rock formations in the area are relatively stable and there is very little timber used in the mine to support roofs or walls of stopes. Because the moderate dip is generally below the angle of repose of the muck, most of that broken rock does not have to be removed from the mine. In areas where slopes are greater than 35 degrees ladders have been installed, generally constructed from 2 inch by 4 inch lumber, though some metal ladders are also in use. The wood used for the ladders, like virtually all wood used in the mine, deteriorates over time and there is considerable water present which facilitates that process. There are many places in the mine that old timbers have rotted away, but no ground fall has resulted because of the stability of the surrounding material. The gold produced by the mine is of such a high grade that it is generally "hand sorted," i.e., the miners simply pick up nuggets of gold and place them into a sack on their belts.

By the time of the events here at issue, the mine had been affected by adverse economics in the gold mining industry and had scaled back its operations. On February 12, 1999, all 40 miners then working were laid off. A group of 14 of them, however, went back to work ostensibly as independent contractors, using the mine's equipment, but generally supplying their own tools. They determined where and how to mine and split the proceeds of their efforts with the mine. By the summer of 1999, the group of miners had dwindled to 6-7. That arrangement ended in October 1999, when some miners were re-hired by Original Sixteen to One.

The relationship between the Secretary's Mine Safety and Health Administration (MSHA) and Respondent, primarily through its President, Michael M. Miller, has grown increasingly antagonistic over recent years. Respondent cites the fact that from 1985 to 1997, when its operations were some ten times as large, a total of 83 citations had been issued at the mine. Conversely, in the 1997-99 time frame, some 85 citations have been issued. It has accused MSHA of conducting a "search and destroy" mission in an attempt to overwhelm it. Respondent issued subpoenas to the former Assistant Director of the Department of Labor and two other officials to testify at the hearing. Respondent hoped to illicit testimony regarding the meaning of regulatory provisions and enforcement policies that would explain what it viewed as excessive and arbitrary government enforcement action. It also attempted to call as a witness the member of the Secretary's Office of the Solicitor who prosecuted the cases. The subject subpoenas were quashed, after a telephonic hearing, on qualified immunity, privilege and relevance grounds, with the caveat that if Respondent was able to proffer admissible evidence essential to its defense that it expected to obtain from a particular witness, the ruling would be reconsidered. No such proffer was made. Other areas of concern were explored by Respondent at the hearing, e.g., the experience, training and other qualifications of the MSHA inspectors and

whether they were motivated to write additional citations to secure advancement.[1]

The citations and orders at issue in these cases arose out of inspections conducted by two inspectors employed by MSHA, Curtis Petty and Bruce Allard. One of Respondent's main challenges to the alleged violations is that they, and related gravity assessments, are based largely on subjective judgments made by inspectors who lack relevant experience and training to make such judgments, especially in the unique conditions presented by Respondent's mine. Both Petty and Allard were relatively new inspectors but both had fairly extensive mining experience.

Petty was certified as an "authorized representative" of the Secretary, an MSHA inspector, around August of 1998. Like all inspectors, he underwent extensive training at the National Mine Health & Safety Academy, graduating in December of 1998.[2] He also attended three week training courses in special and accident investigation. He accompanied experienced inspectors on inspections and, by the time he testified, had conducted several investigations of mine accidents, including accidents that had occurred at underground gold mines. He serves as one of twelve MSHA members of the National Mine Rescue Team, attends training with the team and assists in training mine operators. Prior to becoming an inspector, Petty worked for eight years at the Pegasus Gold Mine in Montana, serving as safety director for two years. He also worked in a mine in Peru for three years.

Allard also was trained at and graduated from the Academy. He became an MSHA inspector in July of 1999, one month prior to his inspection of Respondent's mine, his first inspection of an underground mine as a certified MSHA inspector. He worked for twenty two years at an underground gold mine in South Dakota operated by Homestake Mining Co., including, seven years as a hard rock miner and two years as a safety inspector. He served on Homestake's mine rescue team for seventeen years, and underwent yearly training for that position.

Independent Contractors

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[1] Although the litigation of these cases was difficult to control, despite the issuance of a detailed supplemental prehearing order requiring written proffers of lay and expert testimony and the submission of witness' qualifications in writing, it was conducted by the parties in a professional manner. A limited exception, however, was Respondent's characterization of the testimony and motivation of government witnesses that prompted the Secretary to file a motion to strike those references from the record. Respondent's position is that the characterizations are supported by evidence in the record and were not necessarily intended to connote criminal conduct. While the motion will be denied, Respondent is urged to avoid such controversial terminology, which does little to advance its arguments.

[2] He was certified as an inspector prior to his actual graduation because he was given credit, based upon his experience, and had attained the qualifications necessary for that position.

One of Respondent's defenses is that it should not be held responsible for violations that occurred while mining operations were being conducted by the small group of independent contractors. There is some question about the exact status of the "independent contractors." Respondent apparently continued to have men on-site and also continued to supply workmen's compensation coverage for the independent contractors. None of the independent contractors obtained permanent MSHA identification numbers, as permitted under 30 C.F.R. Part 45, and there is no evidence that other provisions of Part 45 were formally complied with. In any event, it is clear that an operator can be held "strictly liable for all violations of the Act that occur on the mine site, whether committed by one of its employees or an employee of one of its contractors. *Mingo Logan Coal Co.*, 19 FMSHRC 246, 249 (Feb. 1997) and cases cited therein. Respondent's independent contractor defense must be rejected.

Findings of Fact and Conclusions of Law

Citation No. 7969922

Citation No. 7969922 was issued by Inspector Petty on April 1, 1999, after inspecting the secondary escapeway. He observed several conditions that he concluded constituted a violation of 30 C.F.R. § 57.11051(a), which requires that escape routes be inspected at regular intervals "and maintained in safe, travelable condition." The conditions he observed were noted on the citation as:

> The secondary escapeway was not maintained as required. The fourth ladder from the 800 level had only one rail. The next ladder did not project 3 feet above the landing. Air/water pipes travel along the escapeway restricting access, requiring a person to either belly crawl under them or climb over them. The first ladder at the 2100 sub-level was not secured properly (loose) and the last ladder below the 2100 level was not secured properly as well. The third ladder above the 2200 level has a broken rail and the last ladder has a broken rung. Several ladders were not properly equipped with landings. In the event of a mine emergency requiring usage of the secondary escapeway miners could be endangered trying to travel through this section. If the escapeway was used to evacuate an injured miner, it is reasonably likely that at least one ladder would not support the weight of rescuers and victim. * * *

Petty inspected the mine with Mark Loving, a representative of Respondent, and Jerry Hulsey, a fellow inspector who was a large man, described as 6 feet 2 inches tall and weighing 285 pounds. The ladder with the broken rail actually cracked when Hulsey was on it, which led to Petty's conclusion that at least one ladder wouldn't bear the weight of a mine rescue team trying to evacuate an injured miner. Problems with unsecured ladders, such as one of those noted in the citation which was loosely secured with one wrap of bailing wire, and defects such as broken rungs, pose a higher risk of injury during an emergency.

Petty concluded that the violation was reasonably likely to result in an injury expected to

result in lost work days or restricted duty, that the violation was S&S and that the operator's negligence was high, amounting to an unwarrantable failure to comply with a mandatory standard. He terminated the citation on May 11, 1999, because the mine was not conducting operations below the 800 level. He specified on the termination document that: "If and when the mine proceeds to operate below the 800 foot level, the secondary escapeway shall be renovated and made compliant as per the original citation. Failure to do so shall be recognized as aggravated conduct and appropriate action shall follow."

Petty based his determinations on his training, both as a miner and an inspector for MSHA, and his practical experience as a miner and a member of the national mine rescue team. His concerns about potential injuries were based upon his assessment that miners who are forced to use a secondary escapeway because of an emergency, e.g., a fire or ground fall, do so in a hurried manner and do not exercise the care of miners making a normal exit of a mine. The presence of smoke or dust can significantly impair a miner's ability to follow a prescribed route, avoid obstacles and use devices such as ladders. He was aware that there were several potential sources of fire in the mine, including electrical substations at different levels and a pump powered by electricity at the 2200 level. In addition, he considered difficulties that might be encountered by a mine rescue team wearing self-contained breathing apparatus attempting to enter the mine or transport an injured miner strapped into a "Stokes" stretcher through the secondary escapeway. He had traveled the secondary escapeway in 1998 and had pointed out many of the same shortcomings at that time to Respondent's then safety director and the mine manager, neither of whom were employed by Respondent at the time of this inspection.

Respondent's chief challenge to Petty's observations and conclusions are to his qualifications and experience and lack of familiarity with Respondent's mine and similar mines in the area. Respondent argues, e.g., that evaluating the sufficiency of the escapeway in the hypothetical situation of a mine rescue team using self-contained breathing apparatus is unrealistic because there has never been such a rescue required in the mines in that district. It also challenges the scenario of fire and smoke presence, because there are very few potential fire sources in the mine and argues that the miners are all experienced and well-trained and would not likely panic in the event that they had to use the secondary escapeway. Respondent also contends that Petty wrongly applied standards for travelways to this escapeway. Based upon examinations of the escapeway made in preparation for the hearing in this case, Respondent also asserts that its ladderways and landings met all applicable requirements and that all areas of the escapeway meet the minimum opening size requirement of 24 inches by 24 inches and that any difficulty that Hulsey had with tight quarters was due to his size, not a deficiency in the escapeway.

Respondent's objections to Petty's qualifications are easily dispensed with. Petty was an experienced miner, having been involved in safety issues for much of that time. He was extensively trained prior to becoming an MSHA inspector and is highly qualified in mine rescue techniques. It is clear that Petty was easily qualified to make judgments and determinations on the existence of violations and issues of gravity. The Secretary argues that an experienced inspector's "interpretation of the [regulatory] term 'safe [and] travelable' is entitled to deference," citing *Martin v. OSHRC*, 499 U.S. 144, 148-49 (1991) and *Energy West Mining Co., v. FMSHRC*, 40

F.3d 457, 460-61 (D.D.Cir. 1994). The cases relied upon, however, address an entirely different issue, i.e., the deference to be afforded the Secretary's interpretation of an ambiguous regulatory provision. No such issues are presented here. The Commission has held that the judgment of an inspector is an "important element" in determining whether a violation is significant and substantial. *Harlan Cumberland Coal Co.*, 20 FMSHRC 1275, 1278-79 (Dec. 1998); *Mathies Coal Co.*, 6 FMSHRC 1, 5 (Jan. 1984); *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822-825-26 (Apr. 1981); *Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 135-36 (7th Cir. 1999). Both Petty and Allard had limited experience as inspectors at the time of the inspections here at issue. However, they received considerable training and had substantial experience in the mining industry. Their conclusions are entitled to weight appropriate to their experience and qualifications.

I also reject Respondent's argument that, because the miners were highly experienced, the "panic factor" should not be considered in evaluating whether the escapeway was maintained in a safe and travelable condition. The secondary escapeway would be used as such only in the event of an emergency when the normal travelway was inaccessible. There would certainly be an element of urgency for miners using it and when evaluating the condition of the escapeway. it would be unrealistic to fail to take into consideration that miners may be hurrying, possibly with limited vision because of smoke.

Respondent's other arguments have more merit. Petty did not take measurements at critical points to determine the slope of ladders or stopes or of the size of openings where he concluded that passage was restricted. It appears that his concerns about restricted passage were largely related to Hulsey's difficulty because of his size and considerations of difficulties that a rescue team might encounter while carrying a stretcher and wearing self-contained breathing apparatus. Petty believed that the minimum opening for an escapeway was 24 inches by 24 inches[3] While an opening that size would appear adequate to allow expeditious passage by a miner under normal conditions, it would pose a considerable restriction for a large man and it would not be surprising that a miner or rescue team member would have to remove a self-contained breathing apparatus from his back to pass through such an opening.

Miller had not traveled the secondary escapeway in almost ten years. On January 15, 2001, in preparation for the hearing, he traveled a portion of it with two individuals, Jason Burke and Ray Witkopp, who took measurements of slopes and openings in the escapeway. Burke, a graduate engineer in the process of obtaining his State of California license as a civil engineer, had worked at Respondent's mine as a mine engineer doing mapping and surveying from October 1996 to June of 1998. Witkopp, an expert in the field of geology, has worked extensively with Miller in identifying areas of the mine that are likely to contain gold such that mining efforts can be more effectively directed. They traveled the escapeway from the 1700 level to the surface and used a Brunton compass, tape measure and laser pointer to take measurements. They determined

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[3] *See*, 30 C.F.R. § 57.11037, which specifies a minimum opening of 24 inches by 24 inches for ladderways constructed after November 15, 1979, in underground travelways.

that the slopes of the stopes and other portions of the escapeway ranged from nearly horizontal to a maximum of 60 degrees. In every location where the slope was greater than 35 degrees ladders were provided. They had no difficulty negotiating pipes that crossed the ladderways and similarly, found no areas with significantly restricted openings. However, it is apparent that some pipes present during Petty's inspection had been moved because Allard visited the mine in October to, among other things, observe pipes that had been moved.

I credit the testimony of Burke, Witkopp and Miller, and find that the measurements that they took as to slopes were accurate. Those aspects of the escapeway would not change, even over a period of many years. At least from the 1700 level to the surface, ladders were provided on all slopes greater than 35 degrees and there were no slopes greater than 60 degrees. Witkopp and Burke did not travel to portions of the escapeway below the 1700 level and take similar measurements. The reason that their travel was limited was not explained, although it could have been because those areas were intended to be inactive.

Respondent's contention that Petty improperly applied standards applicable to travelways to the secondary escapeway also carries some force. The regulations contain relatively specific provisions applicable to underground travelways.[4] *See*, 30 C.F.R. §§ 57.11001-57.11041. Among them are 30 C.F.R. § 57.11006, which requires that ladders project 3 feet above landings or that substantial handholds be provided, and § 57.11041, which requires that landings be provided every 30 feet for ladders inclined more than 70 degrees. Similar provisions are not found in the regulations governing escapeways. While Petty did not issue citations for specific conditions that may have been violations had they occurred in a travelway, he did reference the more restrictive travelway regulations in describing conditions that he determined made the escapeway less safe.[5]

Respondent contends, in essence, that references to such conditions improperly graft regulations governing much more frequently used travelway into those governing escapeways. Accepting Respondent's argument, however, would lead to an absurd result, i.e., that the existence of a regulation governing a specific condition applicable to one area of a mine precludes an inspector from considering similar conditions in enforcing more general regulations applicable to another area. I hold that even though a specific condition in the escapeway did not itself violate a standard, e.g., the failure of a ladder to project 3 feet above a landing in the absence of substantial handholds, such a condition could properly be taken into account in evaluating whether the overall condition of the secondary escapeway was safe and travelable. Petty did not cite Respondent for violating a regulation applicable to travelways and it likely would have been improper for him to have done so. As noted, *infra*, Allard did cite such specific conditions in the

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[4] A travelway is defined in the regulations as "a passage, walk or way regularly used and designated for persons to go from one place to another." An escapeway is defined as "a passageway by which persons may leave a mine." 30 C.F.R. § 57.2.

[5] Petty testified that he viewed the specific conditions as violations but determined to group "several violations" together under the single citation he issued.

escapeway as violative of travelway regulations. The Secretary vacated those citations.

I am troubled by one of Petty's conclusions, however. His determination that "several ladders were not properly equipped with landings" is problematic, because at least some of the areas referred to were at or above the 1700 level, where the maximum slope was no more than 60 degrees. Those ladders were not inclined at or more than 70 degrees, so that landings every 30 feet would not have been required even for a travelway. Petty was using the travelway regulation, at least for reference. However, he did not take measurements of slopes or openings, and was likely in error in estimating the slope of the ladders, which is understandable in that environment. Allard apparently made a similar error during his later inspection. While additional landings may enhance safe travel in the escapeway, I will not consider the absence of such landings in determining whether the conditions violated the standard and, if so, whether the violation was significant and substantial or the result of Respondent's unwarrantable failure.[6]

In an enforcement proceeding under the Act, the Secretary has the burden of proving an alleged violation by a preponderance of the evidence. *In re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1838 (Nov. 1995), *aff'd., Secretary of Labor v. Keystone Coal Mining Corp.,* 151 F.3d 1096 (D.C.Cir. 1998); *ASARCO Mining* Co., 15 FMSHRC 1303, 1307 (July 1993); *Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2152 (Nov. 1989); *Jim Walter Resources Inc.*, 9 FMSHRC 903, 907 (May 1987).

The conditions observed by Petty, many of which are not rebutted by competent evidence,[7] establish a violation of the standard. I find that there were improperly secured ladders and ladders with a broken and a missing rail and a broken rung. I further find that air and water lines in one location did create restrictions that would impede expeditious travel through the escapeway and that handholds were not provided in some instances where they would have reduced the risk of injury to a miner using the escapeway. These conditions created a reasonable possibility of an injury to miners using the escapeway. I also find that Petty accurately evaluated the gravity factors when he concluded that it was reasonably likely that an injury resulting in lost work days or restricted duty could reasonably be expected in light of the violation.

Significant and Substantial

A "significant and substantial" (S&S) violation is described in Section 104(d)(1) of the

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[6] Landings would serve a number of purposes, among them limiting the length of a fall and providing a place to rest. The travelway regulation evidences the Secretary's determination that such risks are substantially reduced where ladders are sloped less than 70 degrees.

[7] Respondent contends that its foreman repaired deficiencies in the escapeway. That, however, was clearly a reference to abatement efforts, not repairs that were done prior to Petty's inspection.

Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." A violation is properly designated S&S "if, based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981).

In *Mathies Coal Co*, 6 FMSHRC 1, 3-4 (Jan. 1984), the Commission explained:

> In order to establish that a violation of a mandatory safety standard is significant and substantial under *National Gypsum*, the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard--that is, a measure of danger to safety--contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature. (footnote omitted)

See also, Buck Creek Coal, Inc. v. MSHA, 52 F.3d 133, 135 (7th Cir. 1999); *Austin Power, Inc. v. Secretary*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g, Austin Power, Inc*., 9 FMSHRC 2015, 2021 (Dec. 1987) (approving *Mathies* criteria).

In *U.S. Steel Mining Co., Inc.*, 7 FMSHRC 1125, 1129 (Aug. 1985), the Commission stated further as follows:

> We have explained further that the third element of the *Mathies* formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury." *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1834, 1836 (August 1984). We have emphasized that, in accordance with the language of section 104(d)(1), it is the *contribution* of a violation to the cause and effect of a hazard that must be significant and substantial. *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1866, 1868 (August 1984); *U.S. Steel Mining Co., Inc*., 6 FMSHRC 1573, 1574-75 (July 1984).

This evaluation is made in terms of "continued normal mining operations." *U.S. Steel Mining Co., Inc.*, 6 FMSHRC at 1574. The question of whether a particular violation is significant and substantial must be based on the particular facts surrounding the violation. *Texasgulf, Inc*., 10 FMSHRC 498 (Apr. 1988); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 1007 (Dec. 1987).

The Secretary's argument that the violation was S&S is based upon Petty's determination that a miner was likely to be injured while using the escapeway to leave the mine during an emergency and that a rescue team member might be injured. However, it is unlikely that the secondary escapeway would be used under normal mining operations. There were very minimal mining operations being conducted during the time frame that the citation was issued and there was no evidence that any significant increase was planned in the reasonably foreseeable future.

While there was some evidence that there were plans to do some active mining in the area near the secondary escapeway there was also evidence that future mining operations would be focused in the north end of the mine, necessitating development of a secondary escapeway in that area. Very few miners, no more than four, would have used the escapeway in the event of an emergency. While it is reasonably possible that a miner using the escapeway in an emergency might sustain an injury from the unsafe condition, the likelihood of an actual injury occurring under normal mining conditions was remote. Moreover, the injury reasonably likely to occur would not be serious, and would result from a slip or fall partially down a slope of 30-60 degrees. The escapeway was required to be inspected only "periodically," which would have been infrequent in light of the extremely limited mining operations being conducted in that area. A person qualified to make such inspections would not be doing so under emergency conditions.

The deficiencies noted with respect to use of the escapeway by a mine rescue team were legitimate concerns. However, the possibility of a mine rescue team having to enter the mine, even without wearing self-contained breathing apparatus, is so remote under the circumstances presented here, that the potential for injury to a mine rescue team member has virtually no effect on assessment of the risk or seriousness of injury. While there was evidence that a fire had occurred in a mine that is now part of the Original Sixteen to One Mine, that fire occurred some 50 years ago. The Secretary introduced no evidence of the circumstances of the fire. I accept Miller's testimony that the fire did not endanger miners, that no rescue or self-contained breathing apparatus was used and that conditions that resulted in that fire no longer exist in the mine.

I find that the Secretary has not met her burden of proving a reasonable likelihood that the hazard contributed to by the violation will result in an injury of a reasonably serious nature and that the violation was not S&S.

Unwarrantable Failure

In *Windsor Coal Co.*, 21 FMSHRC 997, 1000 (Sept. 1999), the Commission reiterated the law applicable to determining whether a violation was the result of an unwarrantable failure.

> The unwarrantable failure terminology is taken from section 104(d) of the Act, 30 U.S.C. § 814(d), and refers to more serious conduct by an operator in connection with a violation. In *Emery Mining Corp*., 9 FMSHRC 1997 (Dec. 1987), the Commission determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Id*. at 2001. Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care." *Id*. at 2003-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (Feb. 1991); *see also Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 136 (7th Cir. 1995) (approving Commission's unwarrantable failure test). The Commission has recognized that a number of factors are relevant in determining whether a violation is the result of an operator's unwarrantable failure, such as the extensiveness of the violative condition, the length of time that the violative

condition has existed, the operator's efforts to eliminate the violative condition, and whether an operator has been placed on notice that greater efforts are necessary for compliance. *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994); *Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (Aug. 1992). The Commission also considers whether the violative condition is obvious, or poses a high degree of danger. *BethEnergy Mines, Inc.*, 14 FMSHRC 1232, 1243-44 (Aug. 1992) (finding unwarrantable failure where unsaddled beams "presented a danger" to miners entering area); *Warren Steen Constr., Inc.*, 14 FMSHRC 1125, 1129 (July 1992) (finding violation aggravated and unwarrantable based on "common knowledge that power lines are hazardous, and . . . that precautions are required when working near power lines with heavy equipment"); *Quinland Coals, Inc.*, 10 FMSHRC 705, 709 (June 1988) (finding unwarrantable failure where roof conditions were "highly dangerous"); *Kitt Energy Corp.*, 6 FMSHRC 1596, 1603 (July 1984) (conspicuous nature of the violative condition supports unwarrantable failure finding).

The Secretary's unwarrantable failure argument is based on the nature of the violation, its duration and prior notice to Respondent. Relying on *Faith Coal Co.*, 19 FMSHRC 1357, 1369 (Aug. 1997) and *Jim Walter Resources, Inc.*, 19 FMSHRC 480, 488-89 (March 1997), the Secretary places particular emphasis on the prior notice factor based upon her argument that the deficiencies had been the subject of a citation issued in 1997 and had been pointed out to mine management during an inspection in 1998.

While it is true that a citation was issued in 1997 for failure to maintain the secondary escapeway in safe and travelable condition, such a citation, based upon a number of factors in a large area of the mine, many without reference to a specific location, is less probative on the prior notice factor than a prior citation citing a particular violation at a specific location.[8] Here, it is not at all clear that the conditions noted some two years earlier that resulted in the 1997 citation, were the same as those observed by Petty. Petty did not testify about the earlier citation and did not base his conclusion upon it.[9]

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[8] *See, e.g., Jim Walter Resources, Inc.*, 19 FMSHRC 480, 488-89 (March 1997), a case cited by the Secretary, where the issuance of an identical citation for the same problem at the same location less than two weeks earlier, combined with two other orders and an extensive history of similar violations, mandated an unwarrantable failure finding.

[9] Respondent argues that it contested that citation, that it has not yet been adjudicated and should not, therefore, be considered. The Secretary contends that there is no record of a contest. While there is some question as to the status of the citation, the Commission held, in *Jim Walter Resources, supra*, that a citation issued as close as two weeks previously, and which obviously had not been adjudicated, was a proper element to take into consideration in assessing whether a violation was the result of an operator's unwarrantable failure. In any event, I place no weight on the previous citation, for the reasons noted above.

The Secretary also relies, however, on the fact that Petty had pointed out some of his concerns to Respondent's previous safety director during an inspection of the escapeway in 1998. He specifically mentioned the air/water lines and restricted access and was concerned about missing landings. He concluded during his inspection that Respondent had done no work to remedy the problems he had identified in 1998. While I credit Petty's testimony to the extent that some of the conditions that he based the citation on existed in 1998, it is not clear that many of the particular conditions itemized on the citation existed in 1998. Moreover, Petty's comment included a reference to missing landings, which I have not relied on in determining that a violation existed.

I do not find that the violation was attributable to Respondent's unwarrantable failure to comply with the standard. The violation was based upon a number of factors, each of which, standing by itself would not have amounted to a violation. There is little evidence as to the duration of many of the conditions. One, in fact, occurred during the inspection, when a rung or rail cracked when Hulsey stepped on it. That area of the mine was generally inactive and miners were present infrequently, at best. It was required to be inspected only periodically when mining operations that created a possibility of use of the secondary escapeway were ongoing. The prior notice argument, for the reasons noted above, does not carry enough weight in combination with these factors to establish an unwarrantable failure here. In that regard, I also note that the individuals that Petty talked to in 1998 no longer worked for Respondent.

Citation No. 7969947

This citation involves Respondent's compliance with 30 C.F.R. part 49, which implements the Act's requirement in § 115(e) that every operator of an underground mine shall assure the availability of mine rescue capability for purposes of emergency rescue and recovery. Prior to 1998, Respondent's operations were of sufficient size that it could supply its own mine rescue teams. As financial difficulties overtook it, however, Respondent was no longer able to supply its own teams to satisfy the regulatory requirement. On September 22, 1998, Respondent was issued a citation for failure to comply with the Part 49 requirements. By May 6, 1999, Respondent had not come into compliance and MSHA saw little effort from Respondent to do so. On May 6, 1999, Petty issued a § 104(b) order to Respondent directing Miller to withdraw all miners from the underground operation. The order specified that: "This order will remain in place until the operator has complied with the requirements under CFR Part 49 and *an MSHA inspector lifts said order*." (emphasis added). Petty terminated, or lifted, the order on May 7, 1999, following receipt of a letter indicating that Toluene County search and rescue teams would respond in the event of an emergency. On May 12, 1999, however, Petty reinstated the order because Respondent had not satisfied all of the requirements of 30 C.F.R. § 49.3, which governs alternative mine rescue capabilities for small and remote mines. Respondent had not submitted a satisfactory escape and evacuation plan, as required by § 49.3(c)(5). The continuation sheet reinstating the order listed seven specific documentary requirements that Respondent had to satisfy and stated:

> The order to withdraw miners from the underground operation will remain outstanding until the small and remote mine rescue plan is sent to the western district office and is approved.

Jonathan Farrell, the mine manager, promptly gathered the required documents and Respondent submitted the documents by facsimile to MSHA's district office on or about May 13, 1999. Miller had several conversations with the MSHA official responsible for approving the documents, apparently Don Downs. After a day or two of review, Downs had a conversation with Miller and told him that the documents satisfied the regulatory requirement. Miller then allowed the miners to resume underground operations. The mine's operations were subsequently featured in a television program.

Petty became aware of the program and, since he had not lifted the reinstated order, concluded that Miller had resumed operations in violation of the order. On June 1, 1999, he traveled to the mine, ascertained that six miners were working underground and issued Citation No. 7969947, which cited Respondent for violating the order that had been "issued on May 12, 1999." He noted that an injury was unlikely to result from the violation, which was not S&S, and concluded that the operator's negligence was high, because of Miller's specific knowledge of the May 12, 1999 order. Miller had told him that MSHA district officials had allowed them to resume working underground. Petty then returned to the office, somewhat upset, where a meeting was held with involved MSHA officials, including Downs. Petty was focused upon the language of the May 6 order stating that only an MSHA inspector could lift it. He was satisfied,

at the conclusion of the meeting, that no MSHA inspector had lifted the order.

In order to facilitate Respondent's return to productive work, Petty returned to the mine the next morning with Downs, who reviewed Respondent's documentation in a meeting with Miller and Farrell. Petty testified that initial portions of the June 2 discussion appeared to indicate that some aspects of the order's requirements had not been satisfied. However, he did not remain for the discussion, which pertained to Downs' field of expertise, and did not know which, if any, of the itemized requirements of the May 12, order had not been satisfied. Downs confirmed that the documents provided by Respondent satisfied the Part 49 requirements and Petty terminated the order. During a break in the meeting, when Petty was absent, Miller and Farrell confronted Downs about his failure to admit to Petty that he had verbally approved the documents that had been submitted and, in essence, authorized the return to work. Downs was "embarrassed" by what he understood to have been overstepping his authority in essentially lifting the order.

The Secretary argues that Respondent is chargeable with high negligence because of its "intentional disregard of MSHA's authority" evidenced by the fact that it "blatantly failed to get an inspector's approval before sending miners back into the mine." The Secretary's argument, however, erroneously refers to the May 6, 1999 order, that was, in fact, terminated by Inspector Petty on May 7, 1999. The modification, referred to as the order "issued on May 12, 1999" in the citation, reinstated the previous order but did not specify or require that it be lifted only by an MSHA inspector. Rather it stated that the order would remain in effect until the mine rescue plan had been approved by the district office.

Respondent does not contend that Downs specifically lifted the order. Rather, Miller testified that he dealt with the MSHA official that he was directed to deal with and assumed that that person had the authority to approve the plans and documents that he submitted in response to the May 12, 1999, modification. He was told by that official that the documents satisfied the itemized requirements of the May 12, 1999 modification and was told something to the effect "you're good to go." He acted on that statement and allowed the underground operation to resume and further allowed the resumption of operations to be openly broadcast on a television program. He further testified that no additional documentation or information was submitted to MSHA between 8:00 p.m. June 1, when the citation was issued, and 8:47 a.m. on June 2, when it was terminated after Downs verified to Petty that the documents satisfied the requirements of the May 12, 1999, order.

I accept Miller's testimony on these points. He obviously did not try to conceal the fact that miners were working underground and believed in good faith that the requirements of the May 12, 1999, order had been satisfied. He was, in fact, correct. Downs, the MSHA district official responsible for approving the mine rescue plan, had done so, and — by the terms of the order itself — it no longer remained in effect.

The Secretary argues that § 104(b) of the Act specifies that only "an authorized representative of the Secretary [can determine] that such violation has been abated." The Secretary further asserts that Downs, who was not an inspector, could not lift the order and that

Downs, in fact, did not lift the order, based upon a statement he allegedly made to Petty.

These arguments miss the mark. The Secretary, like Petty, focused upon the original order's notation that only an MSHA inspector could lift it. However, Petty lifted that order on May 7, 1999. While it is true that reinstated order, referred to as the order "issued on May 12, 1999," in the citation, had not been lifted by an inspector, until Petty did so on June 2, that order did not contain a requirement that it be lifted by an inspector. Rather, its effectiveness was conditioned upon approval of the mine rescue plan by the district office, which occurred a day or two after documentation had been submitted on May 13, 1999. Consequently, the May 12 order, by its own terms, was no longer effective.

The Secretary has failed to carry her burden of proof on Citation No. 7969947, and it will be vacated.

Order No. 7969514

Order No. 7969514 was written by Inspector Allard on August 27, 1999. It was one of ten alleged violations of mandatory health and safety standards cited for conditions he observed while inspecting the secondary escapeway and adjoining areas. This order alleges a violation of 30 C.F.R. § 57.11051(a), a failure to maintain the escapeway in a "safe [and] travelable condition." The conditions that led him to issue the order, barring access to "all areas of the underground mine affected by the secondary escapeway," were noted on the order as:

> The secondary escapeway from the surface to the 2200 level was not maintained in a safe, travelable condition. Hazards in the escapeway included but were not limited to the following: there were only two landings from the surface to the 1500 [level]. Below the second landing there was a steep slope without a ladder or stairs that ended at a ladder which did not project above the ground level. Air and water pipes crossed over the ladder restricting access. Several ladders were offset from the ladders below. Some ladders had rotten and cracked rungs. An area below the 1500 level did not have ladders, stairs or other means of making travel safe. Loose rock had been allowed to accumulate behind ladders in some areas. Several areas had restricted toe clearance. There were several open, unguarded holes along the travel ways on the 1700 level and the 2200 level. The escapeway must be used on a regular basis for inspection purposes. With continued use of the escapeway in this condition, it is reasonably likely that serious injuries could occur. The operator engaged in aggravated conduct constituting more than ordinary negligence in that [it] had been cited for this condition and had not repaired the escapeway before working below the 800 level. (Reference citation # 796922) This violation is an unwarrantable failure to comply with a mandatory standard.

Allard issued separate orders or citations for seven of the specific conditions referred to above and also attributed them to high negligence by the operator and concluded that all but one was S&S. The standards alleged to have been violated, however, were applicable to underground

travelways, not to escapeways. Those citations and orders were vacated by the Secretary. Allard also took no measurements of slope angles or openings, at least at the time he issued the citations.[10]

Allard concluded that it was reasonably likely that an injury would occur that would result in lost work days or restricted duty and that one person was affected by the violation. He further concluded that the violation was S&S and was attributable to the unwarrantable failure of Respondent.

These are essentially the same conditions and/or types of conditions, that Petty had cited on April 1, 1999. Respondent, likewise, presented essentially no direct evidence that the conditions noted by Allard did not exist as he observed them. I find that Allard accurately described conditions that existed in the escapeway at the time of his inspection. As noted previously, I accept the testimony regarding the measurements taken by Burke and Witkopp and find that they accurately describe the slopes of the stopes from the 1700 level to the surface.

I find that the overall condition of the secondary escapeway, as in the case of the citation issued by Petty, was in violation of the cited standard. As in that instance, while each individual condition was not violative of any standard in itself, the combination of conditions, each of which incrementally increased the risk of injury, resulted in the escapeway not being maintained in a safe and travelable condition.

Significant and Substantial

For the same reasons that I found that the violation alleged in Citation No. 7969922 was not S&S, I hold that the violation alleged in this citation was not S&S. Allard, like Petty, was concerned about landings that, as noted above, were not required, even under the regulations governing travelways.

Unwarrantable Failure

The Secretary's argument on unwarrantable failure with respect to this violation is considerably stronger than that advanced with respect to Citation No. 7969922. Here, many of the same conditions that had been noted by Petty on April 1, 1999, continued to exist. Petty had terminated that citation, allowing the conditions to remain, on the specific condition that no work be done below the 800 level. Respondent was specifically warned that allowing work below the 800 level without making the escapeway safe and travelable would amount to aggravated conduct. Work was done below the 800 level, without any apparent effort to address the inadequacies noted by Petty. Two miners had been down to the 1500 level to change a pump and other miners had been at the 1700 level attempting to locate ore deposits and marking areas for

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[10] He later measured slopes in two areas and found that they were essentially consistent with the measurements taken prior to the hearing by Burke and Witkopp.

future mining. Respondent characterizes this latter effort as exploration or development and notes that a second escapeway is not required during the exploration or development of an ore body. 30 C.F.R. § 57.11050(a). While that work may properly be characterized as exploration, it did not absolve Respondent of the responsibility to maintain the escapeway, which had been designated as an escapeway on Respondent's escape and evacuation plans, safe and travelable. Respondent also protests again that citations that it has contested and have not yet been adjudicated should not be used against it in an unwarrantable failure analysis. That argument is again rejected. I find, based upon the nature and duration of the conditions and the prior specific notice to Respondent, through Petty's 1998 survey and April 1, 1999 citation, that efforts were needed to address the conditions of the escapeway, that the violation was the result of Respondent's unwarrantable failure.

Citation No. 7955049

Citation No. 7955049 was issued by Allard on August 26, 1999, as he inspected the secondary escapeway. He observed conditions, as described on the citation as:

> A draw raise on the 1700 level by survey tag number 17-50 had a hang-up of material which could fall to the travelway below. The timbers for the chute and supports had rotted or fallen away. The adjacent travelway is part of the secondary escapeway submitted to MSHA on 5/1999. The area is not often used but was going to be used during the week of 8/30/1999.

He determined that the conditions violated 30 C.F.R. § 57.3200,[11] that the conditions were unlikely to result in an injury requiring lost work days or restricted duty, that the violation was not S&S and that the operator's negligence was moderate.

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[11] 30 C.F.R. § 57.3200 states:

> Ground conditions that create a hazard to persons shall be taken down or supported before other work or travel is permitted in the affected area. Until corrective work is completed, the area shall be posted with a warning against entry and, when left unattended, a barrier shall be installed to impede unauthorized entry.

Respondent's defense to this citation is that the material did not present a hazard because it was cemented together and that the area in question was not active. While the area may not have been an active work area, the 1700 level had been designated as part of the secondary escapeway on Respondent's escape and evacuation plans. Respondent originally questioned the accuracy of MSHA's plans which showed that area was part of the escapeway. However, its plans also showed the area as being part of the escapeway. There was also evidence that men had been working in the area. Freshly painted markings on the walls indicated areas where mining was to occur. I find that miners had recently been in the area and that the area was part of the designated secondary escapeway. I also find that the material presented a hazard. Allard had observed rubble on the floor of the 1700 level that had fallen from the raise and he determined that there was a possibility of additional material falling. Timbers had rotted away, reducing support for the material. Respondent's witnesses confirmed the presence of the fallen rubble and the rotted timbers. Witkopp opined that material in the mine can become cemented together and Billy Joe Van Meter, who accompanied Allard, felt that the material was "pretty well cemented" together. His judgment was based solely upon his visual observations. There was no attempt to explain why additional material would not fall, in light of the fact that some had already fallen.

I find that the conditions cited violated the standard and that Allard correctly assessed the gravity and negligence factors.

Citation No. 7969519

Citation No. 7969519 was issued by Inspector Allard on September 1, 1999, after he inspected the amalgamation/refinery area of Respondent's mill. It alleged a violation of 30 C.F.R. § 56.18002(a), which requires that a competent person designated by the operator perform a workplace examination at least once each shift and that conditions that may adversely affect safety or health be corrected promptly. The conditions which lead to the issuance of the citation were what Allard described as high levels of mercury contamination on gloves, tools and a handrail. In response to an inquiry, he was told that Respondent did not test for mercury contamination and had no equipment at the site to perform such tests. He concluded that a person being unknowingly exposed to such contamination could suffer serious illness and determined that it was reasonably likely that a miner could suffer an illness resulting in lost workdays or restricted duty. He concluded that the violation was S&S. The degree of operator negligence was assessed as "moderate" because, even though the exposure would be infrequent, there had been a prior citation for mercury contamination.

Farrell was the only person handling mercury at the time and he did not conduct tests for mercury contamination either daily or prior to working in that area. MSHA's personnel had come to the mine in the past and had done some testing and helped establish proper procedures for handling mercury. The individual who had worked in that area when the mine was operating with a full crew had undergone blood testing on occasion and those tests were negative for mercury, leading Farrell to conclude that Respondent's procedures for handling mercury were appropriate. Farrell conceded, however, that Respondent itself did not test for mercury contamination in the amalgamation facility prior to the issuance of the citation and he could have been unknowingly

exposed to excessive levels of mercury, e.g., that found inside of the gloves that he would have used. Shortly thereafter, Farrell began testing for mercury contamination.

The use of mercury, a toxic substance, in the amalgamation/refinery area dictates that appropriate steps be taken to assure that miners working in that area are not exposed to excessive levels of mercury. A proper workplace examination of the area, per Allard, would include testing to ascertain whether a miner would be exposed to mercury. Respondent was not performing such testing prior to the issuance of the citation. Consequently, the violation has been proven.

I find, however, that the Secretary failed to prove that the violation was S&S. The evidence introduced in support of that allegation consisted of the test results and an anecdotal account by Allard of a fellow inspector who had suffered an "extreme" case of mercury poisoning. While it is beyond dispute that exposure to mercury can result in serious illness, an assessment of the risk of serious illness should be based upon some quantitative evidence of the actual degree of exposure and the length of time over which a person was exposed to it. The test results established the concentrations of mercury at various locations. However, the Secretary does not point to a standard that demonstrates the degree to which those concentrations exceeded allowable limits. More significantly, it is undisputed that only one person, Farrell, worked in that fenced off, locked and posted area and that he worked there on a "very irregular basis" such that there was "little" or "infrequent" exposure. On the facts presented here, it has not been established that infrequent exposure to the levels of mercury present in the area would be reasonably likely to result in a serious illness and the Secretary's S&S designation cannot be sustained.

Citations No. 7969525 and No. 7969526

Citations No'd. 7969525 and 7969526 were issued by Allard on October 27, 1999, after he discovered explosives, blasting agents and detonators stored in cardboard boxes in a dead-end drift at the 1700 level of the mine. The materials had apparently been left in that location when the miners were called out of the mine and laid off on February 12, 1999. Since no ore extraction had occurred in that area of the mine since that time, the materials had lain, undisturbed, until discovered by Inspector Allard. Citation No. 7969525 alleged a violation of 30 C.F.R. § 57.6161, which provides:

> § 57.6161 Auxiliary facilities.
>
> (a) Auxiliary facilities used to store explosive material near work places shall be wooden, box-type containers equipped with covers or doors, or facilities constructed or mined-out to provide equivalent impact resistence and confinement.

Citation No. 7969526, cited a violation of 30 C.F.R. § 57.6302, which requires that explosives and blasting agents "shall be kept separate from detonators until loading begins." He based the alleged violation in the fact that a fifteen foot piece of detonating cord was stored in the same box with 15 blasting caps. For each citation, Allard concluded that fatal injuries affecting

two miners were reasonably likely to occur and also found the violations "Significant and Substantial." As noted in the citations, those conclusions were based, in part, on the fact that he observed "several large rocks on the floor [of the drift] which had apparently fallen from the back rib." He concluded that a large rock falling on the explosive materials could result in an explosion. His assessment of the potential for injury was based upon information that there had been a proposal to locate a rescue chamber in the area, which was adjacent to an area that may, in the future be designated as a secondary escapeway and that miners were going to be working there in the future. However, he rated the operator's negligence as "Low" because area had not been mined since February of 1999.

Respondent does not dispute the accuracy of Allard's observations. It does, however, challenge his determination that a falling rock could cause an explosion, as well as his assessment of the potential for injury based upon possible future operations. Farrell testified that the explosives were very stable and difficult to detonate, that he was familiar with all reported fatal accidents in the district and had never heard of an explosion caused by an impact to explosives. He further testified that no-one had worked in that area of the mine since February of 1999, that the area had been posted to prohibit entry without authorization and that, while there had been proposals to establish a secondary escapeway and refuge chamber, they were made after the citations were issued and had never been approved. As to the projection of miners' exposure in the event that future mining operations were conducted in the area, Respondent relies on its intentions to conduct a proper workplace examination before any work would be done in an area of the mine and that all defects and hazards would be corrected.

That Respondent violated the provisions of the regulations cited in the subject citations is apparent. The explosive materials clearly were not stored in compliance with those regulatory requirements. It is equally clear, however, that the gravity determinations made by Allard were excessive and that the violations were not S&S. On the basis of Allard's and Farrell's testimony, I conclude that there was a possibility of an explosion, though remote, due to falling rock. The possibility of such an explosion injuring a miner was also quite remote. While no miners had been working at extracting ore in that area of the mine, there had been some exploration at the 1700 level and miners had been down in the south end of the mine to replace a pump. It is possible that, in the unlikely event of an explosion caused by a falling rock, a miner could be in close enough proximity to be injured as a result. Projections of possible injuries based upon potential future mining operations, where there has been no formal commitment to actually conduct those operations and the conditions are of a nature that they should be identified in a proper work place examination and corrected prior to the actual commencement of mining efforts directed at extraction of ore, cannot support the S&S designation here. There is no reasonable likelihood that the hazard contributed to would result in a serious injury. I find that the inspector's assessment of the operator's negligence as "Low" was accurate, that the possibility of injury was unlikely, that the nature of a possible injury was lost work days or restricted duty and that two miners would be affected.

Citations No. 7969532 and No. 7969533

Citation No. 7969532 was written by Allard on November 2, 1999, for an alleged violation of 30 C.F.R. § 57.6101(a), which provides:

> § 57.6101 Areas around explosive material storage facilities
>
> (a) Areas surrounding storage facilities for explosive material shall be clear of rubbish, brush, dry grass, and trees for 25 feet in all directions, except that live trees 10 feet or taller need not be removed.

He observed brush growing within 6 feet of the side and back and dry grass within 6 feet of the back of the surface explosives storage magazine. The grass was thin and short and the bushes were green. The magazine was constructed of steel with an internal wood liner. He determined that a fire in the area would not be likely to spread to the magazine, but if it did, it could present a hazard to persons fighting the fire. He assessed the possibility of injury as "unlikely," but fatal to one miner if it occurred and rated the operator's negligence as "moderate."

Citation No. 7969533 cited a violation of the same standard based upon similar conditions existing around the blasting cap storage magazine. In addition to dry grass and brush, including a blackberry bush, there was a small tree, approximately 3 feet in height, within 15 feet of that magazine. He assessed the potential for a injury as "unlikely" and the operator's negligence as "moderate."

Respondent contends that there was no realistic possibility of a fire or any threat to the magazines because there was very little potentially combustible material in the areas, that any grass and brush that may have been there was sparse and wet due to recent rainfall and that precipitation at that time of year generally kept things from being combustible. While Farrell testified that the areas were clear of combustible material, he acknowledged that the broken rock that the magazines were constructed upon did support a small amount of vegetation, Miller too acknowledged that there was a small amount of grass in the area, some dead and some growing, and that blackberry bushes grow in the area, and both admitted the presence of the tree. The standard is specific, the area within 25 feet of an explosive storage magazine must be kept clear of brush and dry grass. While the likelihood of a fire that could have threatened the magazine may have been extremely low, the Secretary was not required to prove a specific threat of fire. I find that brush and dry grass was within 25 feet of the magazines and that a tree less than 10 feet in height was within 25 feet of the blasting cap storage facility. While, I agree with Respondent's assessment that combustion was highly unlikely and that virtually no threat was posed to the magazines, the presence of a 3 foot tree evidences a failure to assure compliance with the standard for at least a few months.

Allard appropriately assessed the potential for injury for both citations as "unlikely" and the operator's negligence as "moderate." I disagree with his assessment that the injury that might result from the violation cited in Citation No. 7969532 would have been fatal. The small amount of combustible material in the vicinity of the steel cased magazine posed no threat to

ignite the contents of the magazine. The potential injury is more accurately categorized as "no lost workdays."

Citation No. 7969536

On November 3, 1999, Inspector Allard observed that copies of citations that he had issued as early as October 27, 1999, and served on Farrell on October 28, 1999, had not been posted on the mine's bulletin board. He issued Citation No. 7969536, alleging a violation of § 109(a) of the Act, which provides, in pertinent part:

> A copy of any order, citation, notice or decision required by this Act to be given to an operator shall be delivered to the office of the affected mine, and a copy shall be immediately posted on the bulletin board of such mine by the operator or his agent.

Respondent does not dispute that copies of the citations were not posted on the bulletin board until November 3, 1999, when this citation was issued. It contends that the "spirit" of the Act was satisfied because each of the citations had been discussed with the small crew of miners then working, such that they were aware of the substance of the citations. While the discussions may have served the notification purpose, at least in part, they do not substitute for, or establish compliance with, the Act. The violation was clearly proven and the gravity factors appropriately assessed as no likelihood of injury. Operator negligence was appropriately classified as moderate.

The Appropriate Civil Penalty

The Original Sixteen to One Mine, is a small operation, with 19,546 hours worked in 1999 and 17,401 hours worked in 2000. The evidence is somewhat inconsistent on Respondent's violation history. The Secretary introduced a report showing that Respondent had been issued a total of 157 violations over the period January 1, 1990 to January 1, 2001, only 42 of which had been paid. Many, including those at issue in these cases, had not yet been adjudicated. The assessment control sheets generally show that Respondent has been issued one violation for every two inspection days in the 24 month period preceding these violations. I find that Respondent has a relatively good history of violations. Respondent introduced evidence of its financial condition, financial statements for 1996, 1997, 1998 and 1999. They show that Respondent has operated at a net loss for all of those years, but retained assets of $2,013,884.00 at the end of 1999, including $308,420.00 in inventory. Included in that inventory was a large gold nugget, referred to as the "whopper," which was exhibited at the hearing. That nugget contained some 141 ounces of gold, valued at approximately $40,000 at the time of the hearing. Respondent did not argue in its brief that payment of the proposed civil penalties would threaten its ability to continue in business. In light of these facts, I find that neither payment of the proposed civil penalties, nor payment of the reduced civil penalties imposed by this decision, will impair Respondent's ability to continue in business. I also find that the civil penalties imposed below are appropriate to the size of Respondent's business.

The proposed civil penalty for Citation No. 7969922 was $400.00. The violation was sustained. However, the violation was held to be neither S&S nor the result of Respondent's unwarrantable failure. Taking into consideration all of the factors required to be assessed under § 110(i) of the Act, I impose a civil penalty of $100.00 for this violation.

The proposed civil penalty for Order No. 7969514 was $800.00. That violation, the result of Respondent's unwarrantable failure, was sustained. However, I did not find the violation to have been S&S. I impose a civil penalty of $500.00 for that violation.

The proposed civil penalty for Citation No. 7955049 was $55.00. That violation was sustained in all respects and I impose a civil penalty of $55.00.

The proposed civil penalty for Citation No. 7969519 was $113.00. That violation was sustained. However, I did not find the violation to have been S&S. I impose a civil penalty of $100.00 for that violation.

The proposed civil penalties for Citations No'd 7969525 and 7969526 were $122.00 each. Those violations were sustained. However, the gravity assessments were found to have been not as serious as alleged in the citations and they were not found to be S&S. I impose a civil penalty of $55.00 for each of those violations.

The proposed civil penalties for Citations No'd 7969532 and 7969533 were $55.00 each. Those violations were sustained in virtually all respects, the only exception being a slight reduction in the gravity factor for No. 7969523. I impose a civil penalty of $55.00 each for those violations.

The proposed civil penalty for Citation No. 7969536 was $55.00. That violation was affirmed in all respects and I impose a civil penalty of $55.00.

The total of the civil penalties imposed on the contested citations and order is $1,030.00

Settlement

As noted above, at the commencement of the hearing, Respondent withdrew its contest as to Citation No. 7969507 in Docket No. WEST 2000-63 and Citations No's. 7969524, 7969527, 7969528, 7969529, 7969530 (which it is proposed be modified to reflect that the operator's negligence was "Low") and 7969534 in Docket No. WEST 2000-195 and has agreed to pay the full amount of the proposed penalties. During the hearing, Respondent also withdrew its contest of Citation No. 7969537, in Docket No. WEST 2000-195. The parties have requested that the negotiated resolution of the petitions as to those citations be approved as a settlement. I have considered the representations and evidence submitted and conclude that the proffered settlement is appropriate under the criteria set forth in section 110(i) of the Act.

ORDER

The Secretary's motion to strike inappropriate matter is **DENIED**.

With respect to the citations that the Secretary has vacated, Citations No's. 7955042, 7955043, 7955044, 7955045, 7955046, 7955048 and 7955050 in Docket No. WEST 2000-78, and Citation No. 7955047 in Docket No. WEST 2000-195, the respective petitions are hereby **DISMISSED.**

With respect to the citations as to which Respondent has withdrawn its contest, Citation No. 7969507 in Docket No. WEST 2000-63 and Citations No's. 7969524, 7969527, 7969528, 7969529, 7969530, 7969534 and 7969537 in Docket No. WEST 2000-195, the motion for approval of settlement is **GRANTED**, and it is **ORDERED** that Citation No. 7969530 is hereby modified to reflect that the operator's negligence was "low," and that Respondent pay a total civil penalty of $569.00 for the settled citations within 45 days.

With respect to the contested citations, Citation No. 7969947 is hereby **VACATED** and the petition is hereby **DISMISSED**. The remaining citations and order are **AFFIRMED** and Respondent is **ORDERED** to pay a total civil penalty of $1,030.00 for the contested violations within 45 days.

Michael E. Zielinski
Administrative Law Judge

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